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No. 187

Supreme Court of the United States

OCTOBER TERM, 1969

A & S TROPICAL, INC., *Petitioner*,

v.

HIRAM WALKER INCORPORATED and SOUTH FLORIDA LIQUOR DISTRIBUTORS, INC., *Respondents*.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT HIRAM WALKER INCORPORATED IN OPPOSITION

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QUESTION PRESENTED

As regards this respondent (hereinafter "Hiram Walker") the question raised by the holding of the court of appeals below is:

Whether a retail store can maintain a suit under section 2(a) of the Robinson-Patman Act against the ultimate manufacturer of products which the store purchases from an independent wholesale distributor, where a complete factual record contains no evidence

that the manufacturer has on any occassion made or participated in sales to the retail store or to any competitor of the retail store or attempted to control the terms of any distributor's sales to retail stores.

COUNTERSTATEMENT OF THE CASE

This case went to the court of appeals on facts that had been developed through extensive discovery by all parties and were not disputed. Petitioner played a leading role in urging the district court to certify an appeal to the court of appeals. Petitioner stated that the limenal issues presented for decision were "basic" and "controlling"; petitioner assured the district court "that a proper statement of the controlling question can be drafted . . ."; and petitioner insisted that a decision by the court of appeals on the facts of record would be "determinative." (R. 591-592, 594-595, 602.)[1] Petitioner participated in the process by which the summary of pertinent facts included in the district court's order was formulated, complained of no omission, and has at no time contended that further discovery was necessary to complete the factual record necessary for the court of appeals' decision. Both courts below based their decisions on a complete review of the factual record. Both courts agreed on all essential facts.

The district court summarized the pertinent facts shown by the record as follows:

> "[A]ll or practically all of the allegedly discriminatory sales were of distilled spirits initially produced outside Florida by distillers, including

[1] Record citations are to the two-volume printed record in the court of appeals.

> defendant, Hiram Walker Incorporated, and sold by such distillers in interstate commerce to distributors inside Florida, including defendant, South Florida Liquor Distributors, Inc. . . . [and] in turn resold by such distributors, including South Florida Liquor Distributors, Inc., to the plaintiff and to the retail trade generally in Florida, and upon such resale . . . delivered from the respective distributors' warehouses in Florida to such retailers, all of whom are also located in the State of Florida. The plaintiff complains of quantity discounts in sales by such distributors to certain retail outlets with which the plaintiff competes.
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> "There is evidence that most national distillers, including Hiram Walker, advertise their branded products throughout the nation and in Florida and engage in a limited amount of promotional activity at the retail level by so-called 'missionary men,' who are not salesmen but who may from time to time provide retail establishments with a limited amount of point-of-sale advertising material and otherwise promote the sale of products produced by the companies which these men represent." (Petition, App. 11-12,) (Emphasis omitted.)

The court of appeals summarized the record as follows:

> "Hiram Walker does not sell directly to retail stores, and it is undisputed that it does not fix the price or establish the terms and conditions of resale. Rather, Hiram Walker's activities are limited to promotional work by 'missionary' men who provide retailers with advertising materials and generally act to supplement a national advertising effort to promote Hiram Walker products. These 'missionary' men are not salesmen, and do not take orders for liquor.
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> * * *

"In the present case, . . . the record fails to disclose that Hiram Walker ever sold products directly to the appellee, nor did it do so indirectly by controlling the price or terms of resale. In his deposition submitted on the motion for summary judgment, William G. Benjamin, Sr., president and sole stockholder of plaintiff, admitted that he did not know of a single instance in which Hiram Walker sold directly to any retailer. Furthermore, Binford H. Sykes, General Manager of South Florida, and Elliott Feinberg, President of Florida Beverage, stated in their depositions that prices were set entirely by their own companies and without consultation with Hiram Walker. There was no evidence to the contrary and the facts were undisputed. Under these circumstances, appellant Hiram Walker cannot be held liable as a seller within the meaning of the Robinson-Patman Act." (Petition, App. 3-4, 6.)

Inaccuracies in the Petition's Statements of Fact

The petition repeatedly asserts that Hiram Walker sells alcoholic beverages to retail stores "through" a wholesale distributor. (Petition, pp. 2, 5, 9, 14.) To the extent that such assertions imply the existence in the record of any evidence that Hiram Walker has participated in or attempted to influence resale transactions between a distributor and the distributor's retail store customers, such assertions are seriously misleading. The absence of any evidence of participation by Hiram Walker in or attempt by Hiram Walker to exercise control over resale transactions was the factual basis for the court of appeals' decision. (Petition, App. 5-6.)

The petition contains intimations that Hiram Walker's own prices to distributors constitute a pertinent form of influence over the distributor's resale

prices. (Petition, pp. 6, 8, 9, 10.) Obviously Hiram Walker's price to the distributor establishes a price above which the distributor must resell to make a profit. The fact that the distributor may from time to time request and obtain price concessions or allowances from its supplier does not make the distributor a "dummy wholesaler" (petition, p. 8) any more than price concessions exacted by petitioner from the distributor (see R. 584) make petitioner a "dummy retailer." There is no evidence that Hiram Walker's price to distributors was established by persons who even had knowledge of the distributor's past or planned resale prices.[2]

The only specific evidentiary claim made in the petition concerns an alleged transaction with the owner of a retail liquor store in Coconut Grove, Dade County, Florida. (Petition, p. 5; see R. 130.) First, transactions with that store have nothing to do with this case. The complaint alleges that petitioner competes with retail stores in Broward County, Florida. (R. 2.) The owner of the store, Herbert Pross, himself confirmed that he does not compete with petitioner. (R. 186.) Second, Pross, when deposed, specifically denied that he had "ever received any free liquor or any liquor from a representative of or employee of

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[2] See R. 278-279, 323-325, 335. The General Manager of the distributor from whom petitioner and its competitors have allegedly purchased Hiram Walker products testified unequivocally that prices charged retail stores for products purchased from Hiram Walker and other distillers were set by him, without consultation or discussion with Hiram Walker, and that Hiram Walker had never objected to or commented upon the distributor's resale price. (R. 275, 289.) The petition cites no record support for its assertion in argument that Hiram Walker "afforded the distributor depletion allowances in order that it could make discounts" (petition, p. 10); and there is no support for that assertion.

Hiram Walker." (R. 149.) He explained that "Hiram Walker is not allowed to sell [to] me; so I can't get nothing from Hiram Walker." (R. 136.) Pross made it clear that the single discount he claims to have received "in the form of free liquor" (petition, p. 5) was obtained from the distributor, through the distributor's salesman. (R. 131-136, 144-149.)

As regards the petition's separate discussion of "the commerce question" (petition, pp. 12-13), the evidence refutes the suggestion that Hiram Walker products were ordered by any distributor in response to or in anticipation of the needs of a specific customer of the distributor. The distributor with whom petitioner and its competitors have allegedly dealt purchased Hiram Walker products regularly once a month in amounts determined by an automatic data processing system programmed to maintain inventory adequate to supply all the distributor's customers for approximately thirty to forty-five days. (R. 288-292.)

REASONS FOR DENYING THE WRIT

The decision of the court of appeals is not in conflict with any decision of this Court, and the petition makes no explicit claim of any conflict.[3] Nor does

[3] The petition cites Walling v. Jacksonville Paper Co., 317 U.S. 564, in a separate discussion of "the commerce question." (Petition, pp. 12-13.) The "commerce question" is not an independent basis for review insofar as the petitioner's suit against Hiram Walker is concerned, given the court of appeals' holding that Hiram Walker cannot be charged with discriminatory sales by an independent distributor where Hiram Walker has neither participated in nor attempted to control or influence the allegedly discriminatory sales. Moreover, as pointed out earlier, there is no evidence that Hiram Walker products were ordered by any distributor to meet the anticipated requirements of a specific cus-

the petition claim that the decision of the court of appeals on the question presented is in conflict with the decision of any other court of appeals. The petion cites the same decisions that were cited by the court of appeals in rejecting petitioner's claims against Hiram Walker and makes no attempt to develop any conflict, either in any statement of general law, or in the application of controlling law to the particular set of facts presented by this case. Nothing in the petition therefore warrants review by this Court.

Moreover, the decision of the court of appeals was plainly correct. The Federal Trade Commission has played the leading role in formulating the "indirect purchaser" doctrine upon which petitioner relies in its suit against Hiram Walker. In *General Foods Corp.*, 52 F.T.C. 798, 813 (1956), the Commission declared:

> "No case goes so far as to hold that solicitation of orders by a respondent manufacturer and turning over those orders to an intermediate distributor for billing and handling is sufficient to establish a seller-purchaser relationship between the manufacturer and the persons from whom such orders were procured. The fact that respondent's representatives may have suggested billing prices in a few instances does not indicate a policy or practice on the part of the respondent, and in the

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tomer of the distributor. Hence, *Walling* v. *Jacksonville Paper Co.* fully supports the court of appeals' ruling that the distributor's resale transactions were not sales in interstate commerce. The ruling is also consistent with the court of appeals decisions cited in the same discussion.

The petition cites three other decisions of this Court for general propositions which have no direct bearing on any issue in this case. FTC v. Sun Oil Co., 371 U.S. 505; Moore v. Mead's Fine Bread Co., 348 U.S. 115; Mandeville Island Farms, Inc. v. American Crystal Sugar Co., 334 U.S. 219.

absence of further facts, there is no basis in the present record for a finding that the users who thus procure respondent's merchandise fall within the 'purchaser' category envisioned by § 2(a) of the Act."

All of the decisions cited in the petition and in the court of appeals' opinion are in accord. In this case a thorough review of the record by the court of appeals failed to disclose any evidence that any representative of Hiram Walker participated in or attempted to control or influence resale transactions between retail stores and any distributor whose prices to retail stores are challenged. Indeed, the record does not suggest even those forms of participation by representatives of the ultimate manufacturer deemed insufficient in the Commission's own *General Foods* decision.

CONCLUSION

The petition should be denied.

Respectfully submitted,

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